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No. 92 - 0000

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1992

CALIFORNIA

Petitioner

vs.

BRENDA SUE OTTO and MARVIN ELMER MARK

Respondent

Joint Response to Petition for Writ of Certiorari To the Supreme Court of California

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QUESTIONS PRESENTED

Respondent feels that the questions presented by this case are most fairly stated as follows:

1. Should the exclusionary provisions of 18 U.S.C 2515 be read as creating an unrestricted "silver platter" upon which the government may receive information obtained by private citizens who have perpetrated unlawful wiretaps?

(a) May wiretaps concededly perpetrated in violation of a state law be admitted in a state trial consistent with 18 U.S.C. 2511(2)(d)?

(b) Does 18 U.S.C. 2515 allow a state prosecutor to lawfully republish in the public record the content of confidential telephone communications unlawfully wiretapped and recorded by a private citizen?

3. Is this case effectively moot due to parallel state law provisions which would compel the same result if the case were remanded?

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STATUTE INVOLVED

The statute involved in this case, in addition to those cited by Petitioner, is 18 U.S.C. 2511 (2)(d), which provides in pertinent part:

> "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties has given consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the laws of the United States *or of any state*." *(Emphasis added.)*

I

THIS COURT HAS ALREADY DETERMINED THAT THERE IS NO "PRIVATE CITIZEN" EXCEPTION TO THE EXCLUSION OF WIRETAP EVIDENCE

Petitioner State of California makes it seem that this Court has decided in *United States v. Giordano* (1974) 416 U.S. 505 that there was no prohibition against admission of wiretap information provided by private citizens, and that the California Court ignored such a holding. (Pet'n pg. 10-11)

Giordano had absolutely nothing to do with activity by private parties. It dealt only with the Attorney General's ability to delegate his personal authority to seek judicial authorization for official wiretaps.

Holding that the statute had to be read literally in limiting wiretap authority to the Attorney General personally and to a single individual designated by him, *Giordano* thus stands for the broader proposition that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [1] is to be strictly construed in favor of privacy.

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[1] 18 U.S.C. 2510-2520.

United States v. Donovan (1977) 429 U.S. 413 is also cited as if synonymous with what *Giordano* has been misrepresented as standing for. (Pet'n pg. 11). It is not; *Donovan* also has nothing to do with private wiretaps.

Donovan holds that mere omission of the names of two parties overheard in a later report of a judicially-authorized tap as required by 18 U.S.C. 2518, subd. (1)(b)(iv) - an administrative oversight leading to no additional invasion of privacy - did not require suppression of the entire product of the tap. (See *Donovan*, supra at 434-435)

The state fails to also note that *Donovan did* expressly declare that the statutory exclusionary remedies prescribed in Title III are not dependent on or coextensive with the judicially-fashioned exclusionary rule applied to violations of the Fourth Amendment (429 U.S. at 434-435). The state's assertion that violations of Title III may be excused if "innocent" i.e., perpetrated by a private party, is precisely the kind of grafting of Fourth Amendment exclusionary rule doctrine onto Title III which *Donovan* foreclosed. [2]

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[2] See, e.g., *United States v. Jacobsen* (1984) 466 U.S. 109, 115-116 (Evidence found by employee of private express company not subject to Fourth Amendment). Not even the state court of appeal, which initially held in the state's favor, would accept the "innocent receipt of evidence" rationale. (See

As Justice O'Connor (writing as a state judge) has recognized in a case involving an operator's overhearing of conversations in which a wife conspired with another man to kill her husband, Title III's exclusionary rule far more stringent than any other such rule enforced by federal courts. (*State v. Dwyer* (AZ. App. 1978) 585 P. 2d 900, cited in Appendix "A" to pet'n pg. 39) [3]

Should the exception to that rule sought by California be granted, the floodgates to one of the most common - and pernicious - forms of invasion of privacy would be thrown open. As the 10th Circuit well put it in *Heggy v. Heggy* (10 Cir 1991) 944 F.2d 1537, [cert den. 3/23/92, __ U.S. __ [112 S.Ct. 1514]. [4]

Opinion of Court of Cal. Ct. of Appeal, Sixth App. Dist., Appendix "C" to Petn. at pg. 86)

[3] The state also suggests that there is a conflict among the circuits concerning admission of privately-perpetrated wiretaps, citing *United States v. Underhill* (6 Cir. 1987) 813 F.2d 105, 111-112 and *Traficant v. C.I.R.* (6 Cir 1989) 884 F.2d 258, 266 (Pet'n p. 10) *Underhill*, however, merely holds that a party to an illegal wiretap scheme can not claim to be an "aggrieved" person with standing to object under 18 U.S.C. 2518(10)(a). *Traficant* involved a recording by a party to the conversation.

[4] The state court of appeal cited and declined to follow the district court's opinion in this case, which the 10th Circuit affirmed. (*Heggy v. Heggy* (W.D. Okla. 1988) 699 F. Supp. 1514. See App. "C"

> "Professor Robert Blakey, generally credited as the architect of Title III, testified that 'private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation. [ ] Senator Hruska . . . noted that '[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.'
>
> "It is highly unlikely . . . that applying Title III to interspousal wiretapping will result in increased federal regulation of domestic relations. Rather, the more likely result is a decrease in interspousal wiretapping. [ ] " (944 F.2d at 1541, citations omitted.)

The issue here is as unavoidable as it is straightforward: Will confidential communications be kept private, or won't they be? This Court has clearly held that Title III is a "comprehensive scheme" for the protection of privacy, under which

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to pet'n p. 85) The California Supreme Court embraced the holding of the 10th Circuit. (Appendix. "A" to pet,n p. 23.)

"all interceptions of wire and oral communications are flatly prohibited" (*Gelbard v. United States* (1972) 408 U.S. 41, 46.)

Should Congress' guarantee of absolute privacy be riddled with the state's proposed exceptions for spouses and private parties who come up with something incriminating, the motivation to invade the privacy of the innocent as well as the guilty will become irresistible.

In that case, there will be no privacy for anyone.

II

FEDERAL LAW REQUIRES EXCLUSION OF WIRETAPS CARRIED OUT WITH INTENT TO VIOLATE A STATE LAW

The Federal exclusionary rule contained in 18 U.S.C. 2515 provides for exclusion from state proceedings of an interception of a wire communication which is carried out by a "party to the communication . . . for the purpose of any criminal or tortious act in violation of the constitution or laws of the United States *or any state*." (18 U.S.C. 2511 (2)(d). Emphasis added.)

Even if Joe Otto were deemed a party to the conversations in question - which not even the state claims he was - the publication of his recordings to third parties would still be subject to exclusion.

California State Law contains two provisions forbidding wiretapping and eavesdropping on

confidential communications, and also forbidding derivative use of improperly-obtained information. (Cal. Penal Code sections 631, 632.). [5] The California Attorney General has conceded below that these statutes were violated by the taping of the calls in question, merely claiming that their exclusionary provisions were rendered inoperative by

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[5] Section 631, part of Title 15 of the Penal Code, is declared in Cal. Penal Code section 630 to have been enacted to protect "the right of privacy of the People of this state". It provides in pertinent part,

> "Any person who, by means of any machine, instrument, contrivance, or in any other manner, intentionally taps . . . any telegraph or telephone wire . . . or who wilfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message . . . or communication while the same is in transit or passing over any such wire . . .*or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way*, any information so obtained . . .is punishable by a fine not exceeding two thousand five-hundred dollars ($2,500.00), or by imprisonment in the county jail not exceeding one year, or in the state prison." (Emphasis added.)

Cal. Pen. Code section 632 forbids eavesdropping on both personal and wire communications in similar, overlapping terms.

a state initiative's "truth in evidence" provision. [6]

Neither the state Attorney General nor any of the courts below have addressed the effect of 18 U.S.C. 2511 (2)(d)'s incorporation of state laws into the exclusionary requirements of federal law.

Joe Otto's interceptions were clearly carried out for the purpose of publishing them. This intent is shown by the fact he played one of the tapes for his neighbor, Scott Kennedy, shortly after it was made. This act was itself criminally and civilly actionable under Cal. Penal Code sections 631 and 632. [7]

The recordings having been made with intent to violate state criminal and civil law, they are independently excludable under 18 U.S.C. 2511 (2)(d).

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[6] Cal. Const Art I, section 28(d). The state court of appeal, which did address state law issues directly, also concluded that section 631 was violated.

[7] As the result of the reading of the tapes into the public record, moreover, the tapes have also been aired on two national television programs, *Trial Watch* and *A Current Affair*. It is hard to imagine a more complete invasion of privacy than having one's telephone calls played on national television.

III

THE CALIFORNIA COURT WOULD REACH THE SAME RESULT UNDER STATE LAW.

The California Supreme Court did not expressly base its decision on independent state law grounds, a dangerous thing to do in California. [8] It nevertheless made it clear that were state law invoked - as it would have to be if the case were returned to it - the result would be the same.

In the first footnote to its opinion (App. "A" to petition, pg. 2), the California Court said, "

> "Although defendants relied exclusively on federal law at trial, the Court of Appeal also considered defendants' state law claims based on

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[8] See *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [801 P.2d 1077], which held a 1990 ballot initiative's attempt to entirely eliminate independent state constitutional protection of individual rights invalid under the California Constitution.

> the California Privacy Act. (Pen. Code sections 631, 632.) State Law, however, can not be less protective than the federal act [ ] Because we conclude that suppression is required under Title III, we need not address the issues raised by the parties concerning California Law."

In that addressing those issues would have required the California Court to determine the constitutionality of a all or part of a state initiative constitutional amendment known as Proposition Eight [9], it is understandable that the California Court chose to restrict its discussion to the dispositive federal provisions contained in Title III.

The suggestion is nevertheless clear that were it forced to confront those issues, as it would be on any remand from this Court, the California Court would likely reach the same result on state grounds. This circumstance renders the instant case practically moot, and in any event unfit for a sweeping adjudication of federal issues which might be undercut in the end by the belated application of state law to the facts.

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[9] See discussion in opinion of court of appeal, Appendix "C" to pet'n ppg. 70-77.

CONCLUSION

Failing to present any issue worthy of review by this Court, the petition for writ of certiorari should be denied.

Respectfully Submitted,

MARK L. CHRISTIANSEN
LAURANCE S. SMITH

By:
LAURANCE S. SMITH

DECLARATION OF SERVICE BY MAIL

I, Laurance S. Smith, declare as follows:

I am over the age of 18 years, and not a party to the within action. My business address is 660 J Street, Ste 380, Sacramento, California 95814.

On September 25, 1992 I served the attached document on the following persons by placing a true copy thereof in an envelope addressed to each of them at their address(es) stated below, and by sealing and depositing said envelope in the United States Mail, at Sacramento, California with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California September 25, 1992

LAURANCE S. SMITH